Filed 8/30/16 Buckley v. PennyMac Loan Services CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

EDWARD LYNDON BUCKLEY, et al., as Trustees, Plaintiffs and Appellants, v. PENNYMAC LOAN SERVICES, LLC, et al., Defendants and Respondents.	B266380 (Los Angeles County Super. Ct. No. YC070489)

APPEAL from an order of the Superior Court of Los Angeles County, Ramona G. See, Judge. Affirmed.

Sall Spencer Callas & Krueger, Suzanne Burke Spencer and Michael A. Sall for Plaintiffs and Appellants.

Reed Smith, Lorenzo E. Gasparetti, Karen A. Braje and Zareh A. Jaltorossian for Defendants and Respondents PennyMac Loan Services, LLC and PennyMac Corp.

Burke, Williams & Sorensen, Richard J. Reynolds and Joseph P. Buchman for Defendant and Respondent MTC Financial Inc. doing business as Trustee Corps.

SUMMARY

Appellants Edward Lyndon Buckley and Christina Marie Buckley, as Trustees of the Edward and Christina Buckley Family Trust dated April 29, 2002 (the Buckleys), successfully obtained an order granting them a preliminary injunction to halt the non-judicial foreclosure of their home by defendants and respondents PennyMac Loan Services LLC and PennyMac Corp. (collectively PennyMac), and MTC Financial Inc., doing business as Trustee Corps (Trustee Corps).[1] The Buckleys challenge the portion of the trial court's order requiring them to post a bond of $100,000.00.

Because the Buckleys fail to show the trial court abused its discretion in setting the amount of the bond, we affirm.

BACKGROUND

In 2007, the Buckleys borrowed $1,098,000 from Bank of America, N.A., to finance the purchase of a house in Playa Del Rey. In July 2011, the Buckleys stopped making payments.

Two years later, in August 2013, the Buckleys submitted a loan modification application to Bank of America, which was denied. After Bank of America sold the Buckleys' loan to PennyMac, the Buckleys resubmitted their loan modification application to PennyMac and were again denied.

In March 2014, PennyMac sent the Buckleys a "Notice of Default and Intent to Accelerate," indicating their loan was 1,000 days in default, they had failed to make the last 33 monthly payments of $6,760.59, and the current amount needed to cure the default was $227,473.74.

[1] Trustee Corps filed in the trial court a "declaration of nonmonetary status" (DNMS) under Civil Code section 2924l, which sets forth a procedure by which the trustee to a deed of trust may avoid liability for monetary awards relating to a nonjudicial foreclosure. (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 350-351.) Although the Buckleys filed an objection to the DNMS, the trial court recently found the objection to be untimely under the statute. (See Civ. Code, § 2924l, subd. (c).)

In September 2014, Trustee Corps notified the Buckleys their loan had been referred to Trustee Corps for foreclosure action. Trustee Corps recorded a Notice of Default and Election to Sell Under Deed of Trust in October 2014. The Buckleys then submitted a third loan modification application in January 2015, but the application was again denied. On March 3, 2015, Trustee Corps recorded a Notice of Trustee's Sale set for March 30, 2015.

On March 26, 2015, the Buckleys filed a complaint alleging violations of the California Homeowners Bill of Rights (HBOR),[2] including that PennyMac had engaged in dual tracking.[3] (See Civ. Code, § 2923.6.) After the trustee sale was postponed during unsuccessful negotiations to resolve the matter without litigation, it was reset for June 29, 2015.

On June 15, 2015, the Buckleys obtained a temporary restraining order and an order to show cause for a preliminary injunction, stopping the foreclosure based on the alleged dual tracking. In seeking the preliminary injunction, the Buckleys asked the trial court to waive the requirement for a bond for any damages PennyMac and Trustee Corps might suffer in the event the court ultimately determined the Buckleys were not entitled to the injunction, arguing a lack of harm to PennyMac and Trustee Corps and public interest in the enforcement of HBOR. In its opposition, PennyMac argued it would suffer reasonably foreseeable damage from the injunction, including lost profits and attorney fees incurred in appealing the preliminary injunction or defending the action upon which the preliminary injunction was granted. PennyMac asked the court to set the bond at no less than $314,029.35, which was the amount past due on the Buckleys' loan as of April

[2] HBOR added or amended the following sections of the Civil Code: 2920.5, 2923.4-2923.7, 2924, 2924.9-2924.12, 2924.15, 2924.17-2924.20.

[3] Dual tracking is a practice where the lender continues to pursue foreclosure at the same time the borrower is seeking a loan modification, resulting in the borrower not knowing "where he or she stands, and by the time foreclosure becomes the lender's clear choice, it is too late for the borrower to find options to avoid it." (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 904.)

3, 2015.[4] In reply, the Buckleys argued PennyMac could not collect outstanding payments or fair market rent under California's Anti-Deficiency Laws (Code Civ. Proc., §§ 580d, 726), and therefore those amounts were not damages PennyMac or Trustee Corps would suffer by reason of the injunction.

On July 17, 2015, the trial court granted the preliminary injunction after a hearing, finding the Buckleys had shown a probability of prevailing on the merits as to some of their claims and they would suffer irreparable harm if their home was sold before resolution of the action. The trial court addressed the requirement of a bond in a single sentence, ordering the Buckleys "to post a bond in the amount of $100,000.00." The trial court also denied the Buckleys' request for attorney fees under HBOR. (Civ. Code, § 2924.12, subd. (i).)

On August 20, 2015, the Buckleys filed a notice of appeal.

DISCUSSION

On appeal, the Buckleys challenge the trial court's imposition of a $100,000 bond, arguing only a nominal bond should have been imposed.[5]

Preliminarily, the record on appeal does not contain a reporter's transcript from the preliminary injunction hearing. An appellant "bears the burden to provide a record on appeal which affirmatively shows that there was an error below, and any uncertainty in the record must be resolved against the [appellant]." (See, e.g., *People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.) Without a reporter's transcript of the hearing or a suitable substitute, the record does not reveal the parties' arguments to the court or any

[4] As of April 3, 2015, the estimated total amount needed to pay off the Buckleys' loan was $1,040,015.16.

[5] PennyMac contends that the Buckleys lack standing to appeal because they are not aggrieved by the order granting the preliminary injunction, and consequently must challenge the amount of the bond through a petition for a writ of mandate. We previously considered this argument in PennyMac's Motion to Dismiss Appeal, which we denied. (*Buckley v. PennyMac Loan Servs., LLC* (B266380 Nov. 6, 2015).) As PennyMac does not make any new arguments, we decline to reconsider the issue.

concessions concerning the facts, issues and evidence. In the absence of an adequate record, we must indulge all inferences to support the order challenged on appeal and presume the trial court properly exercised its discretion in setting the bond amount.

Pursuant to Code of Civil Procedure section 529, subdivision (a), if a trial court grants an injunction, it must require an undertaking by the applicant to protect the party against whom the injunction lies.[6] Although section 529 and section 995.240 of the Code of Civil Procedure contain some exceptions to the bond requirement,[7] none of the exceptions applies here, and therefore a bond is mandatory, not discretionary. (*Mangini v. J.G. Durand International* (1994) 31 Cal.App.4th 214, 217; *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 10 (*ABBA*).)

In imposing the bond requirement, "the trial court's function is to estimate the harmful effect which the injunction is likely to have on the restrained party, and to set the undertaking at that sum." (*ABBA*, *supra*, 235 Cal.App.3d at p. 14.) "The sole limit imposed by the statute is that the harm must have been proximately caused by the wrongfully issued injunction. [Citation.] Case law adds only the limitation that the damages be reasonably foreseeable." (*Ibid.*) The amount of the bond is committed to the trial court's sound discretion and will not be disturbed on appeal unless it clearly appears

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[6] Code of Civil Procedure section 529, subdivision (a) provides: "On granting an injunction, the court or judge must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction. Within five days after the service of the injunction, the person enjoined may object to the undertaking. If the court determines that the applicant's undertaking is insufficient and a sufficient undertaking is not filed within the time required by statute, the order granting the injunction must be dissolved."

[7] Under Code of Civil Procedure section 529, subdivision (b), the undertaking requirement does not apply to spouses in a proceeding for legal separation or dissolution of marriage, applicants under the Domestic Violence Prevention Act (Fam. Code, § 6200 et seq.), or public entities or officers (Code Civ. Proc., § 995.220). Moreover, under the Bonds and Undertaking Law (Code Civ. Proc., § 995.010 et seq.), courts have the authority to waive bond requirements for litigants who are indigent. (Code Civ. Proc., § 995.240.)

the trial court abused its discretion by arriving at an estimate that is arbitrary or capricious, or beyond the bounds of reason. (*Hummell v. Republic Fed. Savings & Loan Assn.* (1982) 133 Cal.App.3d 49, 51; *ABBA*, *supra*, 235 Cal.App.3d at p. 14.) "This court cannot substitute its own view as to the proper amount of bond." (*Greenly v. Cooper* (1978) 77 Cal.App.3d 382, 390.)

Recoverable damages include reasonable attorney fees incurred in successfully procuring a final decision dissolving the injunction. (*ABBA*, *supra*, 235 Cal.App.3d at p. 15.) "Thus, 'a successful appeal from an order granting an injunction, after notice and hearing, gives rise to liability on the bond for damages' in the amount of the attorney's fees incurred in prosecuting that appeal. [Citation.] If the preliminary injunction is valid and regular on its face, requiring the defendant to defend against the main action in order to demonstrate that the injunction was wrongfully issued, the prevailing defendant may recover that portion of his attorney's fees attributable to defending against those causes of action on which the issuance of the preliminary injunction had been based." (*Id.* at p. 16.)

In other contexts, courts have recognized the ability of the trial court to determine the value of attorney services even in the absence of expert testimony. "'The value of legal services performed in a case is a matter in which the trial court has its own expertise. [Citation.] The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony.'" (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096.) The same is true in the context of awarding attorney fees as damages for an improperly imposed preliminary injunction. "It is now well settled that reasonable counsel fees and expenses incurred in successfully procuring a final decision dissolving the injunction are recoverable as 'damages' within the meaning of the language of the undertaking, to the extent that those fees are for services that relate to such dissolution [citations]. The fixing of a reasonable fee rests in the discretion of the trial judge and an appellate court will not disturb the ruling unless '"the sum allowed is so exorbitant that its allowance constitutes a palpable and plain abuse of discretion."'" (*Russell v. United Pacific Ins. Co.* (1963) 214 Cal.App.2d 78, 88-89.)

Here, PennyMac argued that reasonably foreseeable damage from the injunction included attorney fees incurred in appealing the preliminary injunction or defending the action, but did not provide an estimate of those damages and instead requested a bond of $314,029.35 based on the amount past due on the loan. While an estimate from PennyMac of its potential attorney fees may have assisted the court, the value of legal services likely to be performed in this case was an estimation the trial court was capable of making based on its knowledge of the nature and status of the case, as well as the claims and issues raised by the parties. Under these circumstances and on this record, we conclude the bond amount of $100,000 is not so exorbitant or beyond the bounds of reason as to constitute an abuse of discretion.[8]

The Buckleys' arguments to the contrary are unavailing. They argue "there is never a basis for a substantial bond in HBOR cases" because the enjoined parties could simply comply with HBOR, thereby dissolving the preliminary injunction, rendering a trial moot, and mitigating any potential damages. Thus, the Buckleys reason, unlike other preliminary injunction cases, the enjoined parties' attorneys fees are not incurred as a result of the preliminary injunction, but "as a result of the enjoined party's decision to fight the injunction rather than simply comply with the law." The Buckleys cite no case law on point for this novel proposition. Like enjoined parties in any other case, enjoined parties in an HBOR action are entitled to pursue the litigation to a final decision on the merits, if they so choose. The Buckleys' argument assumes HBOR plaintiffs like the Buckleys will prevail and ignores the possibility that the enjoined parties might be the ones ultimately to prevail after trial, which is the very situation Code of Civil Procedure section 529 addresses. (*Top Cat Productions, Inc. v. Michael's Los Feliz* (2002) 102 Cal.App.4th 474, 478 [purpose of requiring security is to afford compensation to the

[8] Because damages in the form of attorney fees was raised below and would support the trial court's exercise of discretion to set the bond at $100,000, we decline to address whether the other categories of potential damages raised by the parties are recoverable under a bond.

party wrongly enjoined or restrained and not to prevent plaintiffs from assuming the cost and exposure incident to a bond].)

Next, the Buckleys argue PennyMac in effect sought to impose a "phantom tender" when it asked for the bond to be set at $314,029.35--the amount of payments past due--but courts have repeatedly refused to impose tender requirements on homeowners with HBOR claims, and financially distressed homeowners who are unable to pay amounts past due on their loans would likewise be unable to post those amounts as bonds. The trial court, however, rejected PennyMac's requested amount and instead set the bond at $100,000. Thus the amount of the bond is not fixed at the amount past due on the Buckleys' loan and cannot be equated with a tender requirement. Moreover, a bond requires a surety from a person other than the Buckleys; it does not require principals, like the Buckleys, to pay or tender the amount of the bond. (Code Civ. Proc., §§ 995.140, 995.185 & 995.510, subd. (a)(1); Fam. Code, § 2787 [a surety is "one who promises to answer for the debt" of another].)[9]

Finally, the Buckleys contend that since *Monterossa v. Superior Court* (2015) 237 Cal.App.4th 747, 751, and cases following it recognize that HBOR litigation is unique because plaintiffs effectively prevail for purposes of an award of attorney fees under the statute when they obtain a preliminary injunction, it would be nonsensical for the Legislature to require prevailing plaintiffs to post a bond for the preliminary injunction at the same time that they are entitled to fees and costs. Here, however, the trial court denied the Buckleys' request for attorney fees under Civil Code section 2924.12, subdivision (i).[10] Moreover, *Monterossa, supra*, 237 Cal.App.4th 747, itself does not support the Buckleys' contention, as the preliminary injunction in that case "enjoining the

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[9] The Buckleys, if they so choose, have the option of making a deposit in lieu of a bond. (Code Civ. Proc., § 995.710.)

[10] The Buckleys concede the trial court's denial of their request for attorney fees is not properly part of this appeal, and we therefore do not address it. (See *Monterossa, supra*, 237 Cal.App.4th at p. 751, fn. 3 ["expressly declin[ing] to determine whether an order denying attorney fees and costs under section 2924.12 is immediately appealable or is reviewable upon appeal from a final judgment in the case"].)

trustee's sale of [plaintiffs'] home [was] conditioned on [plaintiffs'] either posting a $20,000 bond or paying . . . $2,135.54 monthly pending trial of the action." (*Id.* at p. 750.)

We have considered the Buckleys' remaining arguments concerning the bond amount and find them to be without merit. The Buckleys have failed to demonstrate that the trial court abused its discretion in setting the amount of the bond.

DISPOSITION

The order setting the amount of the bond at $100,000 is affirmed. Respondents are awarded costs.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

WE CONCUR:

JOHNSON, J.

LUI, J.